

FILED

OCT 08 2013

Clerk, U.S. District Court
District Of Montana
Helena

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

DENISE MARSH CARLSON,

Defendant/Movant.

Cause No. CR 09-15-GF-SEH
CV 13-85-GF-SEH

ORDER DISMISSING MOTION AND
DENYING CERTIFICATE OF
APPEALABILITY

On October 7, 2013, Defendant Denise Marsh Carlson moved to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Carlson is a federal prisoner proceeding pro se.

This is Carlson's second under § 2255. *See* Mot. § 2255 (Doc. 82); Order (Doc. 96); Order, *Carlson*, No. 12-36056 (9th Cir. Feb. 8, 2013) (Doc. 99) (denying certificate of appealability). The Court of Appeals did not pre-authorize its filing. 28 U.S.C. §§ 2255(h), 2244(c). It is subject to dismissal for lack of jurisdiction. *Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam).

Carlson asserts the recent decision in *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151 (2013), provides her a right to relief. It does not. Carlson's guilty plea, *see* Change of Plea Tr. (Doc. 54) at 13:13-23, 29:14-34:4, satisfied *Alleyne*,

133 S. Ct. at 2155, and *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000).

Carlson's advisory guideline calculation was increased for several reasons. *See* Presentence Report ¶¶ 18-32. *Alleyne* explains that its holding "does not mean that any fact which influences judicial discretion must be found by a jury." 133 S. Ct. at 2163. The advisory guidelines are advisory because they may influence – but do not control – judicial discretion. *See Booker v. United States*, 543 U.S. 220, 226 (2005) (invalidating two statutory provisions making sentencing guidelines mandatory). *Alleyne*, therefore, does not mean that factors elevating the advisory guideline calculation must be proved to a jury beyond a reasonable doubt or admitted in a plea colloquy. The motion lacks merit.

Transfer would not be in the interests of justice. 28 U.S.C. § 1631. A certificate of appealability is not warranted. There is no doubt about either the procedural posture of this case, *Gonzalez v. Thaler*, __ U.S. __, 132 S. Ct. 641, 648 (2012), or its lack of merit, 28 U.S.C. § 2253(c)(2).

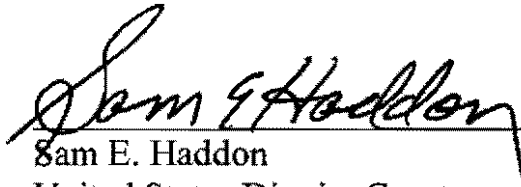
ORDERED:

1. Carlson's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (Doc. 100) is DISMISSED for lack of jurisdiction as an unauthorized second or successive motion;

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Carlson files a Notice of Appeal;

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 13-85-GF-SEH are terminated and shall close the civil file by entering a judgment of dismissal.

DATED this 8th day of October, 2013.



Sam E. Haddon
United States District Court